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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1973

No. 73-353

A. L. ABBOTT, et al., *Petitioners,*

vs.

THE UNITED STATES, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI to the United States Court of Claims

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No.

A. L. ABBOTT, et al., *Petitioners,*

vs.

THE UNITED STATES, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI to the United States Court of Claims

The 2,079 petitioners herein are retired officers and enlisted personnel, regular and reservist, of the Army, Navy, Air Force, Marine Corps, Coast Guard, Public Health Service, and National Oceanic and Atmospheric Administration. Petitioners request that a writ of certiorari issue to review the judgment of the United States Court of Claims denying petitioners' motion for partial summary judgment on the issue of liability, and granting the United States' motion to dismiss the petition.

OPINION BELOW

The opinion of the Court of Claims of January 18, 1973, is not yet reported. It is printed in Appendix A at p. 1a, *infra*.

JURISDICTION

On January 18, 1973, the Court of Claims entered its opinion and judgment denying petitioners' motion for partial summary judgment on the issue of liability and dismissing petitioners' action. On February 16, 1973, petitioners filed a timely petition for rehearing, which was denied without opinion on April 13, 1973. Mr. Chief Justice Burger signed an order on June 14, 1973, extending the time in which to file this petition for writ of certiorari to and including August 31, 1973. The jurisdiction of this Court is invoked under 28 U.S.C. §1255(1).

QUESTIONS PRESENTED

1. Do petitioners and all other retired federal uniformed personnel have a property right to their earned retired pay?[1]

2. Does that property right encompass a vested right to the basis of computation of such pay pre-

[1]It is petitioners' position that their retired pay is deferred compensation for past service and that this Court therefore need only resolve questions 1, 2 and 3. Questions 4 and 5 need be faced only if this Court, or the Court of Claims on remand, were to hold such pay to be current pay for reduced, standby service. Accordingly, those two questions are only noted herein, but will be urged as alternative grounds for reversal if a hearing is granted.

scribed by law in effect (a) during their full performance of service upon which such pay is based and on the date of retirement from active service, or (b) during their full or substantial performance of such service but not on the date of retirement from active service?

3. Do Acts of Congress reducing the basis for computation of such federal retired pay deprive those already entitled to such pay of property without just compensation?

4. Do Acts of Congress denying retired federal uniformed personnel any retired pay, although they had pay withheld during their active service as a means of funding that pay, deprive them of property without just compensation?

5. Do Acts of Congress prescribing different rates of "retired" pay for equal current service, based solely on different retirement dates, result in unconstitutional discrimination?

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

In 1956, Congress codified into positive law provisions for recomputation of the pay of retired members of the armed forces whenever active duty base pay scales were changed. See former 10 U.S.C. §§1401, 3991, 6149, 6151, 6325-27, 6381, 6383, 6390, 6394, 6396, 6398-6400, 8991, 70A Stat. 1, 106, 232, 385-86, 394-96, 404-06, 410-11, 413-14, 556-57. Those provisions were made applicable to members of the other uniformed

services by virtue of 33 U.S.C. §857a, and 42 U.S.C. §213a. See also 14 U.S.C. §423.

The 1956 provisions were suspended in 1958 by §§3 and 4 of P.L. 85-422, 72 Stat. 122, 128, and were repealed in 1963 by §5 of P.L. 88-132, 77 Stat. 210, 212-15. An example of the 1956 provisions, together with the relevant portions of §§3 and 4 of P.L. 85-422, and the Fifth Amendment to the United States Constitution, are set forth in Appendix B at p. 9a, *infra*.

STATEMENT OF THE CASE

Petitioners' claims are founded on the United States Constitution. Jurisdiction of the Court of Claims was invoked under 28 U.S.C. §1491.

In an action on behalf of themselves and all other retired federal uniformed personnel, petitioners seek either the restoration of or compensation for their retirement rights under the repealed pay statutes listed above. Those statutes provided a recomputation system under which petitioners' retired pay was (1) initially computed as a fixed percentage of the base pay (exclusive of allowances and other benefits) for the rank each held at his retirement, and (2) recomputed whenever the active duty base pay for that rank was increased or decreased.[2]

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[2]While in recent years base pay has been consistently increased, in the past it has been reduced and retired pay was reduced proportionately. See *Federal Staff Retirement Systems*, Sen. Doc. No. 14, 90th C., 1st S. pp. 371-72 (1967) (pay of officers reduced 38 1/3% and pay of enlisted personnel reduced 30% between 1932 and 1935). See also *Hearings on Recomputation and Other Retirement Legislation*, H.A.S.C. No. 92-78, 92d C. 2d S. pp. 17341-44 (1972).

That recomputation system was in effect pursuant to successive pay statutes from 1870 to 1958, and was considered "the principal traditional benefit" of a career with the uniformed services.[3] Each petitioner made a lifetime career commitment, and served until involuntarily retired after a minimum of 20 years active duty with the uniformed services, in justifiable reliance on the Government's assurances that his retired pay would be measured pursuant to the recomputation system. Petition 23-26.

During their active service, petitioners' total pay rates were intentionally depressed 6½% by Congress as a means of funding petitioners' prospective retired pay. *Id.* at 26-27. Thus, each petitioner contributed substantially to the funding of his promised retired pay as additional consideration for such pay. Congress has recognized petitioners' contributions by its grant of longevity credit for military service, without additional contributions, to those who abandon a military career before qualifying for retirement, and who thereafter join the civil service retirement system. 5 U.S.C. §§8332(c), 8334(g)(2). These contributions

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[3] *Report of the Defense Advisory Committee on Professional and Technical Compensation* p. 136 (1957). The principal events concerning recomputation are set forth in Appendix C at p. 11a, *infra*. For brief legislative histories of military retirement, see *Federal Staff Retirement Systems*, Sen. Doc. No. 14, 90th C. 1st S. pp. 357-73 (1967); and *Hearings on Recomputation and Other Retirement Legislation*, H.A.S.C. No. 92-78, 92d C. 2d S. pp. 17321-54 (1972).

have also been recognized administratively, at least since 1926.[4]

Retention of the recomputation system was particularly vital to petitioners because the uniformed services, unlike the civil service, use the "retirement" system not only to maintain a minimum income during old age, but also, by systematic early retirement, to ensure that the armed forces remain youthful and vigorous. As a consequence, the overwhelming majority of retired regular personnel of the uniformed services, including petitioners, were routinely and involuntarily retired in mid-life. Petition 30-33.

Early, forced "retirement" has been detrimental to petitioners in two respects. First, their immediate income was drastically reduced when their financial needs were at their peak. Their retired pay is set as a percentage (as low as 50%) of their former base pay which, in turn, may represent only about 50% of their active pay.[5] Thus, their retired pay may be as little as 25% of the pay they received immediately before retirement. Inevitably, therefore, they were

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[4]The Department of Defense and its predecessor have recognized the retirement contribution at least since 1926. See Appendix C, at p. 11a, *infra* (1926-30 entry). See also *Defense Study of Military Compensation, Cost and Value of Military Compensation*, SGMC/MA-2, pp. 51-52 (1962) (interest calculated at 3% on contributions): *Report to the President on the Study of Uniformed Services Retirement and Survivor Benefits by the Interagency Committee* p. 1-5 (1971); *Report of the 1971 Quadrennial Review of Military Compensation* p. 2-3 (current rate of contributions is 7%); *Hearing before the Subcommittee on General Legislation of the Committee on Armed Service* [*of the*] *United States Senate on H.R. 4606*, 92 C., 2d S. p. 11 (Sept. 19, 1972) (same).

[5]2 *Report of the First Quadrennial Review of Military Compensation* p. 20 (1967).

and are forced to seek a second career. Second, petitioners suffer substantial income losses because of their late entry into a second career at the bottom of a new career ladder. The Government acknowledges that those losses are an inevitable *public* cost of a youthful defense force, which should be borne by all taxpayers, not by retired members of the uniformed services alone. Petition 31-32.

With respect to retirement income, there is a decided disparity in treatment between retired members of the uniformed services and retired civil servants under the current retirement system. Contrary to a commonly held view, the former receive a substantially smaller lifetime net benefit from their retired pay, despite their early retirement, than do members of the civil service.[6] There are several reasons for this difference. Civil servants (1) enjoy longer service at full pay, during which time they suffer no income loss; (2) retire at higher ranks, giving them a higher pay scale by which their retired pay is measured; (3) receive a higher percentage of that higher scale, because of their greater longevity; and (4) receive the benefits of any increases in the general standard of living between the time their military counterparts retire in mid-life and they later retire at old age.[7] Thus, in effect, civil servants receive bene-

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[6]5 *Report of the First Quadrennial Review of Military Compensation* p. VII-42 (cols. 1 & 6) (1969).

[7]*Id.* note 6, *supra*, at pp. VII-13 & 14. Of course, when a civil servant is involuntarily forced to accept early "retirement" (e.g. by reduction in staff), he too may face the problems routinely met by "retired" members of the regular uniformed services. See, e.g., *Cancelled Careers, A Report to the Special [Senate] Committee on Aging*, 92 C., 2d S. *passim* (May, 1972) (Committee Print).

fits similar to those formerly provided to petitioners by the recomputation system.

With respect to retirement income, there is also a disparity in treatment among retired uniformed personnel under the current retirement system. Petitioners' pay is based on the differing active duty pay scales in effect when they each were retired. Each new increase in active duty pay rates results in greater disparity in pay among petitioners of equal rank and longevity solely as a result of their differences in age. Petition 33-34.[8] A glaring example of the extent of discrimination now imposed is the difference in treatment between retired reservists, whose commitments are generally minimal beyond standby duty, and active career members who retire after at least 20 years of active service. A reservist's retired pay is measured by the pay scales in effect when he reaches age 60, not at the time of his retirement. See 10 U.S.C. §1331. An active career member's retired pay, in contrast, is determined by the pay scales in effect at the time he is retired, which can be as early as age 37. See 10 U.S.C. §1401. Thus, assuming "basic pay . . . is to increase . . . 5% per year . . . [and] the CPI is . . . to increase 1.5% per year," the reservist who "retires" today at age 37, will receive 80.5% more pay

[8]See also *Report of the U.S. Veterans Advisory Commission* p. 72 (1968) (eight different rates of pay). There are now 11 different rates of pay for the same duty based on rank and longevity.

when he reaches age 60 than will his active career counterpart who "retires" at the same age today.[9] In addition, the reservist will suffer no second career income loss, since his normal civilian career will not be disrupted by military service. No such discrimination existed under the recomputation system.

The cost of the recomputation system was not questioned until 1958. See Appendix C, at pp. 11a-18a, *infra, passim.* Since World War II, however, a much enlarged defense force has been established and maintained. That change inevitably increased accrued federal retirement obligations. Petition, Exhibit 6-5. Although those obligations remained "deferred [public] costs of World War II and the Korean conflict and the present national security requirements,"[10] those costs were not fully borne by the general public. In 1958, wholly as a matter of economy, Congress suspended petitioners' accrued recomputation rights (P.L. 85-422), and then in 1963 repealed the recomputation system and imposed a new retirement system upon them (P.L. 88-132). Petition 27, and Exhibit 6-3 et seq. The pay petitioners have received under this new system is substantially less than what they should have received under the recomputation system in effect when they were on active service and when

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[9]Under the current system, petitioners' retired pay is adjusted after retirement in accordance with the Consumer Price Index, not the current active duty base pay scales. 10 U.S.C. §1401a. The quoted assumptions are from the *Summary of the Report of the Interagency Committee on Retirement and Survivor Benefits* p. S-12, n.1 (1971).

[10]*A Study of the Military Retired Pay System and certain Related Subjects, Report of the Study Committee of the University of Michigan to the [Senate] Committee on Armed Services,* 87th C., 1st S. p. 80 (1961) (Committee Print).

they retired. See *id.*, Exhibit 5, for examples. Thus, in effect, Congress took pay from petitioners and all other retired federal uniformed personnel to increase the pay of active duty personnel. Congress thereby substantially reduced the public cost of an expanded defense force at the expense of petitioners and all other such retired personnel.

REASONS FOR GRANTING THE WRIT

1. DEPENDING ON THE NATURE OF PETITIONERS' FEDERAL RETIRED PAY, THE DECISION BELOW CONFLICTS EITHER WITH DECISIONS OF THIS COURT OR WITH DECISIONS OF THE APPELLATE COURTS OF SEVERAL COMMUNITY PROPERTY STATES.

a. The decision below failed to define the nature of petitioners' retired pay.

The nature of petitioners' retired pay must be determined before the constitutional issues petitioners have raised can be resolved. The opinion below did not discuss or define the nature of that pay and rejected petitioners' constitutional claims solely on the basis of *Akerson v. United States,* 175 Ct.Cl. 551 (1966), cert. den. 385 U.S. 946 (1966), and *Andrews v. United States,* 175 Ct.Cl. 561 (1966), reproduced in Appendix E, at p. 23a, *infra.* Petitioners in *Akerson* contended that the provisions of the 1958 Act were not intended to apply to persons already retired. Therefore, *Akerson* resolved no constitutional issues. Petitioners in *Andrews* sought relief from the 1958 Act on the basis of an asserted vested contractual right to recomputation. Since a public officer's pay for current service may be reduced prospectively (see cases cited in *Andrews,* 175 Ct.Cl. at 563, Appendix at

24a-25a), those petitioners necessarily founded their constitutional claims on the view that their pay was deferred compensation for past services.

The *Andrews* opinion also did not discuss or define the nature of retired pay of the uniformed services. It merely held that retired military "officers have no vested or contractual right to any particular amount of retired pay." 175 Ct.Cl. at 563, Appendix at 24a.[11] That decision was based primarily on *Bell v. United States,* 366 U.S. 393, 401 (1961). See *Norman v. United States,* 183 Ct.Cl. 41, 49, 392 F.2d 255, 259 (1968), cert. den., 393 U.S. 1018 (1969). In *Bell,* however, this Court rejected an attempt by the Government to deprive soldiers of earned compensation because of alleged disloyal conduct during the Korean

[11]Because *Andrews* did not define the nature of their retired pay, petitioners herein based their constitutional claims below both on the view that it was deferred compensation for past service and on the view that it was compensation for current standby duty.

First, if their retired pay is deferred compensation for past service, petitioners sought, for enlisted personnel who served pursuant to written contracts (whose interests were not represented in *Andrews*), as well as for officers:

(a) Restoration of the right to recomputation or just compensation for the taking of that right. Petition 23-29 (First and Second Causes of Action); or,

(b) Recomputation on reaching age 62, on the grounds that their retired pay (i) could not rationally be considered current standby pay after each reaches the mandatory age of retirement; and (ii) is not standby pay before reaching that age, but a second career income supplement. Petition 29-33 (Third and Fourth Causes of Action).

Second, if their "retired" pay is for current reduced service, petitioners sought:

(a) Equal pay for equal standby service. Petition 33-35 (Fifth and Sixth Causes of Action); and/or,

(b) The return of the contributions they made towards the funding of their retired pay, plus interest. Petition 36-37 (Seventh Cause of Action).

conflict. This Court expressly stated: "If a soldier's conduct falls below a specified level he is subject to discipline, and his punishment may include the forfeiture of future *but not of accrued pay.*" 366 U.S. at 401 (emphasis added). *Bell* is, therefore, inconsistent with the decision in *Andrews* if retired pay is deferred compensation for past service.

The United States concedes that petitioners' retired pay is earned compensation, not a gratuity.[12] Their retired pay must therefore have been earned in the past, while on active duty, or it must be earned currently for continuing standby duty.

An analysis of various statutes concerning retired military status supports the view that petitioners' pay after retirement, like that of civilan employees generally, is deferred compensation for past services. See Appendix D, at p. 21a, *infra.* The old view was that military "retired" pay was compensation for reduced but continuing, current service. See, e.g., *United States v. Tyler,* 105 U.S. 244, 246 (1882); *Lemly v. United States,* 109 Ct.Cl. 760, 763, 75 F. Supp. 248, 249 (1948). However, the old view predates the establishment and maintenance of a substantial reserve force since World War II.[13] That view is also inconsistent with the current law governing retired pay. See 2a, *infra.* Therefore, this Court, or the Court of Claims on remand, should resolve the first question

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[12]Defendant's Reply to Plaintiffs' Opposition to Defendant's Motion To Dismiss 7.

[13]See 10 U.S.C. §§672-674, codified in 1956, and based on the Act of July 9, 1952, Ch. 608, §§206, 233, 66 Stat. 483, 489.

presented (see p. 2, *supra*), and determine that petitioners' retired pay is deferred compensation for past services. In any event, whether petitioners' retired pay was earned in the past or is earned currently, the decision below either conflicts with decisions of this Court or of appellate courts of several community property states. This Court should therefore grant petitioners' request that a writ of certiorari be issued.

b. If petitioners' retired pay is deferred compensation for past services, then the decision below conflicts with decisions of this Court.

The power of the Government to reduce the pay of a public officer does not extend to compensation prescribed by the statutes in effect when his services were rendered. *Bell v. United States, supra; Mississippi ex rel. Robertson v. Miller,* 276 U.S. 174 (1928); and *Fisk v. Police Jury,* 116 U.S. 131 (1885). As held in *Miller:*

> . . . [A]fter services have been rendered by a public officer under a law, specifying his compensation, *there arises an implied contract* under which he is entitled to have the amount so fixed. *And . . . constitutional protection extends to such contracts* just as it does to those specifically expressed. . . .
>
> (276 U.S. at 179, emphasis added.)

The 1963 Act repealing the recomputation system substantially reduced the retired pay petitioners would otherwise have received. If petitioners' retired pay as measured by the recomputation system is de-

ferred compensation for past service, as petitioners contend, then the decision below is in direct conflict with decisions of this Court. Therefore, this Court should grant the writ, resolve the second and third questions presented (see pp. 2-3, *supra*), and hold that the 1963 statute repealing the recomputation system is unconstitutional as applied to petitioners.

c. If petitioners' retired pay is compensation for current services, then the decision below conflicts with decisions of appellate courts of several community property states.

The nature of military retired pay has been frequently raised in divorce proceedings. Appellate courts of several community property states have held that such pay is compensation for past services and that divorced wives of retired federal uniformed personnel are therefore entitled to a community share of future payments received after the marriage is terminated. See, e.g., *Busby v. Busby,* 457 S.W.2d 551 (Tex. 1970); *LeClert v. LeClert,* 80 N.M. 235, 453 P.2d 755 (1969); *Morris v. Morris,* 69 Wn.2d 506, 419 P.2d 129 (1966); *In re Karlin,* 24 C.A.3d 25, 101 C.R. 240 (1972). But see *French v. French,* 17 C.2d 775, 112 P.2d 235 (1941) (concerning standby retainer pay of the Fleet Reserve).[14] This rule has even been extended to cases where the husband has served the requisite period of 20 years to qualify for retirement but has not yet been transferred to the retired list. See,

[14]On June 20, 1973, the Supreme Court of California granted a hearing in *In re Fithian,* 4 Civil No. 12269 (1973) (certified for non-publication) in which the California Court of Appeal, Fourth Appellate District, Division Two, rejected the contention that retired military pay is compensation for current service.

e.g. *Bensing v. Bensing*, 25 C.A.3d 889, 102 C.R. 255 (1972); *Webster v. Webster*, 442 S.W.2d 786 (Tex. Civ. App. 1969); *Mora v. Mora*, 429 S.W.2d 660 (Tex. Civ. App. 1968).

Thus, if petitioners' "retired" pay is for current standby service, the decision below is in direct conflict with the state decisions cited above, and this Court should grant the writ and resolve the fourth and fifth questions presented. See p. 3, *supra*.[15]

d. This Court should resolve the nature of petitioners' retired pay so that the Government may not opportunistically characterize that pay differently at various times to its economic advantage.

In *Wilkerson v. Commissioner*, 44 T.C. 718 (1965), the Government successfully argued that "retirement pay . . . is predicated on the performance of past services" and that "the right to receive . . . [retirement pay] is vested" when a "serviceman completes the required years of service and receives the absolute right to retirement pay." 44 T.C. at 722, affirmed, 368 F.2d 552, 553 (9th Cir. 1966). In the instant case, the Government conceded that "retired pay is earned compensation and not a gratuity," and added it "has never contended otherwise."[16] In *Hiss v. Hampton*,

[15]Question 4 asks whether petitioners can be deprived, without just compensation, of all benefit of their pay which was withheld during their active service to fund their "retired" pay, if their "retired" pay is in fact compensation for current standby duty. Question 5 raises the constitutionality of the current statutes as applied, which provide petitioners different pay for equivalent standby service solely because of their differences in age, a physical fact over which they have no control. Compare *Fontiero v. Richardson*, ... U.S. ....., 93 S.Ct. 1764 (1973).

[16]Defendant's Reply to Plaintiffs' Opposition to Defendant's Motion To Dismiss 7.

338 F.Supp. 1141, 1145-46 (D.C. D.C. 1972) (three judge court), however, the Government attempted to establish the lack of monetary jurisdiction on the ground that civil service retired pay is merely an expectancy. (The court upheld jurisdiction, but assumed that there is no vested right to the continuance of such pay. 338 F.Supp. at 1146.) In *Richardson v. Reservists To Stop the War,* October Term, 1972, No. 72-1118, in which this Court has granted certiorari, the Government contends that retired pay of reservists is "paid independent of their present status and is 'in the nature of a pension.'" *Id.,* Petition for Certiorari 13. This contention in effect asserts that reservists' retired pay is a gratuity since a military pension is considered a gratuity. See *United States v. Teller,* 107 U.S. 64, 68 (1883); *Berkey v. United States,* 176 Ct.Cl. 1, 8, 361 F.2d 983, 987 (note 9) (1966).

So long as the nature of petitioners' retired pay is not authoritatively resolved by this Court, petitioners —and retired civil servants as well—are vulnerable to conflicting governmental contentions and court rulings with respect to their retirement rights. This is also true in private litigation regarding their retired pay. Accordingly, this Court should grant certiorari to dispel that uncertainty and to resolve the existing conflict in decisions noted above.

2. THE DECISION BELOW IS ERRONEOUS AND INVOLVES QUESTIONS OF GREAT PUBLIC IMPORTANCE CONCERNING THE RETIREMENT RIGHTS OF ALL FEDERAL PERSONNEL AND THE OBLIGATION OF THE UNITED STATES TO HONOR ITS COMMITMENTS TO ITS CAREER SERVANTS.

a. The decision below is erroneous and has deprived petitioners of a substantial property right.

The decision of the court below is erroneous regardless of what it assumed the nature of petitioners' retired pay to be. If the court assumed such pay is deferred compensation for past service, then its decision is in conflict with decisions of this Court. See 1b, *supra*. If the court assumed such pay is compensation for current service, then its decision conflicts with current law concerning the nature of retired pay. See below.

The decision below is also erroneous because the court dismissed petitioners' *unlitigated* constitutional claims solely on the basis of the doctrine of stare decisis. See Petition for Rehearing 3.[17] After so ruling the court stated:

> Plaintiffs' counsel admitted at oral argument that none of plaintiffs are receiving less retired pay in dollars and cents than they received at the time of their retirement. *Consequently, no property has been taken from them by the government.* . . .
>
> (Appendix at 7a, emphasis added.)

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[17]See note 11, p. 11, *supra*. The decision below was based solely on the holdings in *Akerson* and *Andrews*. Appendix at 7a. *Akerson* raised no constitutional issues, and *Andrews* raised only the issues presented by petitioners' First and Second causes of action, and then only as to officers.

This conclusion is patently erroneous. The fact that petitioners are not receiving less retired pay "in dollars and cents" than they received at the time of their retirement is irrelevant. The relevant fact is that since 1958 they have not received, and are not receiving, what they should receive under the recomputation system in effect during their service and when they retired. Petitioners' loss is substantial and admitted for the purposes of the motions below and this petition. See Petition, Exhibit 5.

That conclusion also conflicts with the decisions of this Court respecting the definition of "property" which is protected by the federal constitution. Petitioners have alleged—and the Government has not denied—that petitioners served their country in reliance upon their retired pay being computed and recomputed on the basis of the active duty base pay for each petitioner's retirement rank. This system of recomputation was based on numerous pay statutes enacted from 1870 to 1955 and on those enacted in 1956 codifying the practice of 86 years. Petitioners also contributed substantially to their expected retired pay by the acceptance of intentionally depressed active duty pay scales. Once petitioners had completely performed their commitment to the Government, they each had earned a vested right to their promised retired pay supported by their past services, their forebearance of a civilian career, and their contributions. *Mississippi ex rel. Robertson v. Miller, supra; Fisk v. Police Jury, supra;* and see *Dismuke v. United States,* 297 U.S. 167, 170 (1936) (comparing the modern civil

service system with the 19th Century military system). Compare *Perry v. Sindermann*, 408 U.S. 593, 599-602 (1972). See also *Chemical Workers v. Pittsburg Glass Co.*, 404 U.S. 157, 181 n. 20 (1971) (private industry); *Berkey v. United States, supra*, 176 Ct.Cl. at 12, 361 F.2d at 990 (public employees). On the vested right of public employees in the statutory provisions by which their future retired pay is to be computed, see, e.g., *Yeazell v. Copins*, 98 Ariz. 109, 402 P.2d 541 (1965); *Abbott v. Los Angeles*, 50 C.2d 438, 326 P.2d 484 (1958); *Allen v. Long Beach*, 45 C.2d 128, 287 P.2d 765 (1955); and see Patterson, *Legal Protection of Private Pension Expectations* 74-77 (1960).[18]

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[18]Petitioners' claims may raise different legal issues with respect to different classes of claimants. The recomputation statutes were first only suspended as to those retired on or before June 1, 1958, by P.L. 85-422, 72 Stat. 122. They were not repealed until October 1, 1963, by P.L. 88-132, 77 Stat. 210. Between June 1, 1958, and October 1, 1963, many thousands more uniformed personnel had retired. That group had no rights under the 1958 Act, but had rights under the 1956 recomputation statutes. Accordingly, the legal rights of the following classes may differ:

(1) Those retired before the effective date of the 1958 Act (approximately 212,000);

(2) Those retired after the effective date of the 1958 Act but before the effective date of the 1963 Act (approximately 179,000);

(3) Those retired after the effective date of either the 1958 Act or 1963 Act but who had fully qualified for retirement before the effective dates of either or both Acts; and

(4) Those who had substantially but not fully qualified for retirement before the effective dates of either or both Acts.

As of June 30, 1972, there were 880,664 retired members of the armed forces alone, 294,200 officers and 586,462 enlisted personnel. Department of Defense, *OASD (M&RA) Actuarial Consultant* p. 1 (November 20, 1972). The specific figures for the first and second classes are derived from data supplied by the National Association for Uniformed Services on June 5, 1973. See Appendix F at p. 27a, *infra*. No available data distinguishes the third and fourth classes, but together they could total 500,000, depending on what is considered "substantial" performance for the purposes of defining the fourth class. See Petition 28 n.9.

Nevertheless, solely in the interests of economy, Congress repudiated the Government's commitments under the recomputation system in disregard of petitioners' vested rights. That action was unconstitutional. *Lynch v. United States,* 292 U.S. 571, 580 (1934).

b. The decision below affects the retirement rights of all federal career personnel, civilian as well as military.

The decision below rejected the immediate claims of only the 2,079 petitioners herein. The court below recognized, however, that "this is a test case, the outcome of which will affect" as many as "900,000 claims of retired government personnel." Appendix at 2a. In fact, the case was filed as a class action on behalf of all such personnel. The number of persons immediately affected, therefore, commands the attention of this Court.

In addition, the potential impact of the decision below will affect the interests of all career federal personnel, civilian as well as uniformed. If Congress can repudiate its just commitments under the recomputation system, and the decision below is allowed to stand, Congress will be able to repudiate accrued rights of all federal personnel,[19] civilian as well as

[19] With the possible exceptions of those few covered by Articles II, §7, and III, §1, of the United States Constitution. Compare *Booth v. United States,* 291 U.S. 339 (1934).

military, even under the present reduced retirement system.[20]

c. Only this Court can vindicate petitioners' reliance on the United States to honor its commitments.

The court below recognized the equity of petitioners' claims, but directed petitioners to Congress:

> . . . The arguments . . . so ably expressed in plaintiffs' briefs should be presented to Congress instead of to us. . . . We understand and appreciate the dissatisfaction of the plaintiffs with the change in the[ir] retirement pay system, as they have rendered long and faithful service to our country in time of peace and war. However, if they are to get any relief, it must come from Congress . . . .
>
> (Appendix at 8a.)

But petitioners' claims have been presented to Congress. Well over 400 bills have been introduced since enactment of the 1958 Act. See Appendix G at p. 29a, *infra*. On December 29, 1972, the Special Subcommittee on Retired-Pay Revisions of the House Committee on Armed Services recommended "that recomputation legislation not be further considered by the committee." H.A.S.C. No. 92-80, 92d C., 2d S. p. 17626

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[20]Under P.L. 92-425, 86 Stat. 706, enacted September 21, 1972, Congress provided the surviving spouse and minor and dependent children of a retired member of the uniformed services a percentage of his or her retired pay in consideration of that member's acceptance of an additional reduction in such pay during his or her lifetime. If the decision below is correct, Congress may at any time repudiate that obligation as well as its obligations under the repealed recomputation system.

(1972).[21] That rejection of legislative relief was, in fact, justified by *Andrews* and *Akerson,* the very decisions of the court below relied on to deny petitioners relief herein. *Id.* at 17646-48.

Petitioners have no remedy unless this Court acts. Only this Court can correct the erroneous and unjust decision of the Court of Claims and vindicate petitioners' reliance on their Government to honor its commitments. Compare *Astrup v. Immigration Service,* 402 U.S. 509 (1971). This Court should therefore grant certiorari to determine authoritatively the vested retirement rights, if any, enjoyed by petitioners and other federal career personnel when they have fully qualified for retirement rights under an existing system. Unless this Court does so, petitioners will forever lose their rights.

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[21]In reliance on this recommendation, the Chairman of the House Armed Services Committee now sends a form letter to all those who inquire concerning recomputation which concludes: ". . . I have no plans to schedule further action on recomputation legislation." See Appendix H at p. 34a, *infra.*

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment and actions of the Court of Claims in this proceeding.

August 24, 1973.

Respectfully submitted,

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(Appendices Follow)

Appendix A

In the United States Court of Claims
No. 785–71
(Decided January 18, 1973)
A. L. ABBOTT, ET AL. v. THE UNITED STATES

Francis X. Driscoll for plaintiffs. *Craig Z. Randall,* attorney of record. *Siegfried Hesse, Fred C. Dodge, Edward O. Reyes, Robert P. Brorby, Julius Kahn, III,* and *Thomas J. Titmus,* of counsel.

Arthur E. Fay, with whom was *Assistant Attorney General Harlington Wood, Jr.,* for defendant.

Before COWEN, *Chief Judge,* DAVIS, SKELTON, NICHOLS, KASHIWA, KUNZIG, and BENNETT, *Judges.*

On Defendant's Motion to Dismiss Petition and Plaintiffs' Motion for Summary Judgment

SKELTON, *Judge,* delivered the opinion of the court:

Plaintiff, A. L. Abbott, and 2,078 other named plaintiffs, all of whom are retired personnel of the Armed Services or the Public Health Service, filed this suit to recover retired pay based on the active duty pay rates applicable to them, respectively, at the time of their respective retirements, plus all statutory active duty pay increases since their retirements,

from June 1, 1958, to the prseent time. This is a test case, the outcome of which will affect between 600,000 and 900,000 claims of retired government personnel, according to the plaintiffs. The plaintiffs have filed a motion for summary judgment and defendant has filed a motion to dismiss the plaintiff's petition on the ground that it fails to state a claim upon which relief can be granted. The case is before us on these motions.

The facts in this case are basically the same as those existing in the cases of *Akerson v. United States,* 175 Ct. Cl. 551 (1966), *cert. denied,* 385 U.S. 946, and *Andrews v. United States,* 175 Ct. Cl. 561 (1966). Those cases were considered together by the court and decided the same day. While some of the contentions of the plaintiffs in *Akerson* were different to those alleged by the plaintiffs in *Andrews,* the overriding central issue in those cases, considered together as they were, was whether or not the 1958 amendment to the Career Compensation Act, Pub. L. No. 85–422, 72 Stat. 122, and the Uniformed Services Pay Act of 1963, Pub. L. No. 88–132, 77 Stat. 210, deprived the plaintiffs of their property without due process of law in violation of the fifth amendment and were, therefore, unconstitutional. We have the identical issue presented to us again in the instant case. The plaintiffs contend here that they are asserting claims that were not raised in *Akerson* and *Andrews,* as will be discussed below, but they admit and allege that the fourteen causes of action set forth in their petition are based upon their contention that the above stat-

utes violate the fifth amendment and are unconstitutional. Consequently, this is the ultimate issue in the case and controls its disposition.

In 1870, Congress established what is known as the "recomputation" system for determining retired pay of retired officers of the Armed Services. Ch. 294, § 24, 16 Stat. 320. In 1885 this was extended to enlisted personnel, 23 Stat. 305. Later on the system was extended to various other departments and grades. The recomputation system provided in general that the retired pay of an officer would be computed as a percentage of the active duty base pay being paid for the rank and grade he held at the time of his retirement, and such retired pay would be recomputed thereafter from time to time so as to allow him the same percentage of *current* active duty base pay provided for officers of the same rank and grade in the active service. In other words, after his retirement, each officer would get an increase in his retired pay based on each increase of active duty base pay provided from time to time by statute for officers of the same rank and grade in the active service. This recomputation system continued through the years and was incorporated by Congress in the recodified Title 10, United States Code in 1956. This system was the law until 1958 when Congress enacted an amendment to the Career Compensation Act (May 20, 1958, Pub. L. No. 85–422, 72 Stat. 122) which provided for a six percent increase in retired pay and a six and one-half percent increase in current active duty pay. This statute had the effect of suspending, but not

repealing the 1956 provisions of Title 10, United States Code, mentioned above, which provided for the recomputation system for retired officers. The 1958 Act only deprived retired officers of one-half of one percent of what they would have received under the previously existing recomputation system because they got a flat six percent increase in retired pay, whereas officers of the same rank and grade on active duty got a six and one-half percent increase in active duty base pay. The 1958 Act also provided that officers who had retired prior to the effective date of the Act would receive retired pay based on the old law plus six percent. The plaintiffs received retired pay computed in this manner until October 1, 1963, when the Uniformed Services Pay Act of 1963 was enacted (Pub. L. No. 88–132, 77 Stat. 210). The 1963 Act repealed the provisions of the 1956 Act (Title 10, United States Code) that required recomputation and established a cost of living system which was tied to the Consumers Price Index. This new system fixed the retired pay of an officer who had retired prior to the effective date of the 1958 Act at a percentage of the active duty base pay being paid to officers of his grade and rank on June 1, 1958, plus a percentage of the increase in the Consumers Price Index thereafter. Officers who retired on or after June 1, 1958, would receive retired pay based on a percentage of the active duty base pay he was receiving for his rank and grade at the time of his retirement, plus a percentage of any increase in the Consumers Price Index after his retirement. In other words, after retirement,

the officer would no longer get the benefit of increased active duty base pay given to officers of the same rank and grade who were on active duty, but would only get a percentage of the increased cost of living index. The plaintiffs complain that what they have received by way of retired pay under the cost of living index system is far below what they would have received under the recomputation system. They seek to recover this difference on the theory that the amount thereof has been taken from them by the government without due process of law contrary to the fifth amendment of the Constitution. They contend, as did the plaintiffs in *Akerson* and *Andrews* that when they entered government service they had a contract with the United States that upon their retirement they would be entitled to retired pay that would be adjusted from time to time on the recomputation basis and that this was a vested right that they enjoyed which could not be taken from them by Congress without violating the Constitution. We decided this very question in *Andrews* when we held:

> The difficulty with this position, as defendant points out, is that there is strong authority for the counter-proposition that officers have no vested or contractual right to any particular amount of retired pay. The general rule has long been that "[a] soldier's entitlement to pay is dependant upon statutory right * * * [and not upon] common-law rules governing private contracts * * *." *Bell v. United States,* 366 U.S. 393, 401 (1961). *Cf., Leonard v. United States,* 279 U.S. 40 (1929); *United States v. McDonald,* 128 U.S. 471 (1888); *Byrd v. United States,* 103 Ct. Cl.

285 (1945); *Amchanitzky v. United States*, 81 Ct. Cl. 409, *cert. denied*, 296 U.S. 598 (1935); *Fulmer v. United States*, 32 Ct. Cl. 112 (1897); *Magaw v. United States*, 16 Ct. Cl. 3 (1880); *Lowry v. McCarl*, 79 F. 2d 144 (D.C. Cir. 1935); *Heidt v. United States*, 56 F. 2d 559 (5th Cir. 1932). And since the pay of officers in the uniformed services is within the exclusive control of Congress, it was free to limit the benefits of the 1958 active duty pay increase to members on the active duty list. [*Id.* at 563.]

See also, Abbott v. United States, 152 Ct. Cl. 798, 804, 287 F. 2d 573, 576 (1961), *cert. denied*, 386 U.S. 915.

The defendant says that we should follow our decision in *Andrews* and *Akerson* on the basis of stare decisis. The plaintiffs, on the other hand, argue that they have raised issues in this case that were not present in either of those cases, which are:

1. Retired pay is accrued compensation for past services and a deprivation thereof violates the fifth amendment.

2. The plaintiffs had a contract with the government which entitled them to retired pay based on the recomputation system and that a repudiation thereof by the government amounted to a taking of their property without due process of law in violation of the fifth amendment.

3. If retired pay is compensation for present services while on inactive duty (*i.e.*, periodic reporting of their whereabouts to the government so as to be subject to recall to active duty), plaintiffs are subject to discrimination based on age, because other retired

officers with the same rank, grade, and length of service receive more retired pay because such other officers retired later at a higher basic rate of active duty pay. They contend this denies them due process of law under the fifth amendment.

4. Plaintiffs' contributions toward the funding of their retired pay have been taken from them without just compensation in violation of the fifth amendment and should be returned to them with interest.

While some of the foregoing contentions of the plaintiffs may be couched in somewhat different language to those that were urged in *Akerson* and *Andrews*, the underlying and controlling issue in those cases and in the instant case is whether or not the 1958 and 1963 Acts described above deprived plaintiffs of their property without due process of law in violation of the fifth amendment. We decided this question adversely to the plaintiffs in those cases. The plaintiffs argue that even if this is true, our decisions in those cases were wrong and we should reconsider them. We think our decisions in those cases were correct and we follow them under the stare decisis rule. We cited the *Andrews* case with approval in *Goodley v. United States*, 194 Ct. Cl. 829, 441 F. 2d 1175 (1971).

Plaintiffs' counsel admitted at oral argument that none of the plaintiffs are receiving less retired pay in dollars and cents than they received at the time of their retirement. Consequently, no property has been taken from them by the government. They are in reality complaining about what they would have

received if the system had not been changed. The arguments in this regard so ably expressed in plaintiffs' briefs should be presented to Congress instead of to us. Congress has the power and authority under the Constitution to establish a system for the payment of retired pay for retired government personnel such as the plaintiffs, and to change the system from time to time as was done in this case. We understand and appreciate the dissatisfaction of the plaintiffs with the change in the retirement pay system, as they have rendered long and faithful service to our country in time of peace and war. However, if they are to get any relief, it must come from Congress, as this is not within our jurisdiction.

We hold that the petition of the plaintiffs fails to state a claim upon which relief can be granted. Accordingly, plaintiffs' motion for summary judgment is denied and defendant's motion to dismiss plaintiffs' petition is granted, and the petition is dismissed.

Appendix B

Former 10 U.S.C. §6149, 70A Stat. 385, enacted August 10, 1956, provided:

> Except for officers whose retired pay is computed under the Pay Readjustment Act of 1942 (56 Stat. 359), the retired pay of each retired officer of the Navy or the Marine Corps shall be computed on the basis of rates of pay provided by law, at the time of his retirement, for officers on the active list. If *after* the *retirement* of any such officer the rates of pay for officers on the active list are changed, the *retired pay* to which the officer is entitled *shall be recomputed on the basis of the new rates.* (Emphasis added.)

Similar provisions were also incorporated in the statutes cited on page 3, *supra.*

All such provisions were suspended by §§3 and 4 of P.L. 85-422, 72 Stat. 128, effective June 1, 1958, but were continued in the 1958 edition of the United States Code "containing the general and permanent laws of the United States in force on January 6, 1959." They were repealed by §5 of P.L. 88-132, 77 Stat. 214, effective October 1, 1963.

The relevant portions of P.L. 85-422 are:

> Sec. 3. (a) Notwithstanding any other provision of law, except sections 4 and 7 of this Act and subsection (b) of this section, the changes in rates of basic pay made by this Act do not increase the amount of retired pay, retirement pay, retainer pay, or equivalent pay to which any person is entitled on the day before the effective date of this Act.
>
> * * *

Sec. 4. (a) Except for members covered by section 7 of this Act and persons with two or less years of service for basic pay purposes who were retired for physical disability or placed on the temporary disability retired list, members and former members of the uniformed services who are entitled to retired pay, retirement pay, retainer pay, or equivalent pay, on the day before the effective date of this Act, shall be entitled to an increase of 6 per centum of that pay to which they were entitled on that date.

(b) Notwithstanding any other provision of law, a member of a uniformed service retired under any provision of law, or transferred to the Fleet Reserve or Fleet Marine Corps Reserve, on the effective date of this Act shall have his retired pay or retainer pay computed on the basis of the rates of basic pay set forth in the Career Compensation Act of 1949, as amended by this Act, or on the rates of basic pay set forth in the Career Compensation Act of 1949 on the day before the effective date of this Act, plus 6 per centum of that pay, whichever is greater.

* * *

The relevant portions of the Fifth Amendment of the United States Constitution are:

> No person shall . . . be deprived of . . . property without due process of law; nor shall private property be taken for public use, without just compensation.

Appendix C

FACTUAL CHRONOLOGY REGARDING RECOMPUTATION

1870: Recomputation system established for officers. Ch. 294, §24, 16 Stat. 320.

1885: Extension of system to enlisted personnel begun. Ch. 67, 23 Stat. 305.

1885-
1920: System extended to various departments and grades on a piecemeal basis. Sen. Doc. No. 14, 90th C., 1st S. pp. 357-373 (1967).

1922: Officers, but *not* enlisted personnel, denied right to recompute retired pay on basis of new active duty scales. Ch. 212, §1, 42 Stat. 626.

1926: Congress prospectively restored recomputation for officers on basis of 1922 Act. Ch. 274, 44:2 Stat. 417. The House Report on the 1926 Act stated that the 1922 Act had been a violation of "*the basic law under which* [*they had*] . . . *gained their retirement rights.*" H. Rep. No. 857, 69th C., 1st S. p. 2 (1926) (emphasis added). The retroactive application of the 1922 Act regarding recomputation was never tested.

1926-
1930: Contributions for the funding of retirement benefits recognized. Report of Secretary of War, in Hearings before the House Committee on Military Affairs, Pt. 1, 69th C., 2d S. pp.

131, 247 (1926); Sen. Doc. No. 259, 71st C., 3d S. 62, 139 (1931). (Interdepartmental Pay Board Reports for 1929 and 1930).

1933-1935: Retired pay reduced proportionately when active duty pay scales reduced. Sen. Doc. No. 14, 90th C., 1st S. p. 372 (1967).

1948: The Advisory [Hook] Commission on Service Pay, appointed by the Secretary of Defense, recommended that (1) the imputed contributory form of payments towards the funding of military retirement be retained because (a) of the difficulty in planning for fluctuating manpower; (b) it would be an unnecessary expense to account for the funds; and (c) the Government, unlike other employers, commands the taxing power to meet its fiscal obligations; and (2) the military retirement system be overhauled in light of modern needs for technical personnel. Career Compensation for the Uninformed Services, pp. 40-48 (1948).

1949: In enacting the Career Compensation Act, Congress rejected the Hook Commission proposals for overhaul, but recognized the necessity for attracting and retaining personnel with specialized skills and training, and continued the imputed contribution method of funding. H. Rep. No. 779, 81st C, 1st S. pp. 2, 9 (1949).

1953: The Judge Advocate General (Army) concluded that all changes in active duty pay

scales should be reflected in retired pay in the absence of express legislative intent to the contrary. He relied on a number of earlier opinions of the Comptroller General to that effect. JAG(A) 1953/4120, 14 May 1953.

1954: The [Kaplan] Committee on Retirement Policy for Federal Personnel undertook a comparative study of all federal retirement systems. It noted: "Laws increasing [military] active duty pay usually stipulate recomputation of retired pay on the new basis. So general is this inclusion that *an impression has arisen that recomputation is automatic,* though the question has never been decided." Sen. Doc. No. 89 [Pt. 1], 83d C., 2d S. p. 221 (1954) (emphasis added). See also, *id.* at 231, 243, 253, 265, 274, 287, and 299.

1955: Career Incentive Act recommended by the Department of Defense to improve active duty retention rates by increasing active duty pay scales. Sen. Rep. No. 125, 84th C., 1st S. pp. 30-33 (1955).

1956: Congress incorporated the recomputation system into recodified Title 10, United States Code, so that recomputation thereafter was expressly required. Sen. Rep. No. 2484, 84th C., 2d S. pp. 125, 281, 471, 662 (1956).

1957: The report of the [Cordiner] Defense Advisory Committee on Professional and Technical Compensation identified recomputation as the *principal* benefit of military employment,

and recommended its retention despite the need to drastically upgrade active duty pay scales. Report, Volume I, pp. 136-137 (1957).

1958: The Department of Defense recommended to Congress that retired military personnel receive no pay increase. Congress nevertheless provided for a 6% increase in retired pay while providing a 6½% increase in active duty pay, thereby suspending, but not repealing, the 1956 provisions of codified Title 10, United States Code. H. Rep. No. 1538, 85th C., 2d S. pp. 7, 47 (1958).

1959: The 1958 edition of the United States Code was issued, "containing the general and permanent laws of the United States in force on January 6, 1959." It included all provisions for recomputation enacted into positive law with the recodification of Title 10, in 1956.

1961: The Study Committee of the University of Michigan, pursuant to its contracts with the Senate Armed Services Committee, concluded Congress should have changed the military retirement system in 1948 (as had been recommended by the Hook Commission) because of changed circumstances beginning with World War II. It also concluded that retirement costs are merely deferred costs of the defense effort, and that those who are "retired" in middle age, are normally unable to obtain comparable employment. Report, pp. 37, 77 (1961).

1962: The [Gorham] Defense [Department] Study of Military Compensation was completed. Among other matters, it assumed "retired" pay is deferred compensation, earned on a month-to-month basis, and should, for planning purposes, *reflect interest* at 3% even though no direct funding is involved. Cost and Value of Military Compensation, SGMC/MA-2, pp. 51-52 (1962).

1963: Congress repealed the 1956 provisions requiring recomputation, and established the current cost of living system, which was ultimately tied to the Consumers Price Index. This limited "retired" pay to a fixed percentage of the purchasing power enjoyed on the date relieved from active duty. PL 88-132, 77 Stat. 212-15.

1964: *Akerson* and *Andrews* petitions filed in Court of Claims, seeking difference in pay that would have been received under 1956 provisions, and what was actually received under the 1958 Act up to the effective date of the 1963 Act. Neither suit raised the constitutionality of the 1963 Act; and no enlisted personnel were joined in either action.

1965: The House Armed Services Committee, "for the record," formally acknowledged that active duty pay scales had *always been depressed* to reflect a contribution towards the funding of military retirement rights. The Committee

determined the rate of contribution was 6½% of total pay (basic pay, plus housing and subsistence allowances, etc.). H. Rep. No. 549, 89th C., 1st S. p. 24 (1965).

March 1966: The Report of the Cabinet Committee on Federal Staff Retirement Systems recorded the shift from the concept that retirement is a gratuity or reward for past services to the accepted view that it is an earned right, though there is no express retirement contract clearly defining the nature and dimensions of the right. H. Doc. No. 402, 89th C., 2d S. p. 18 (1966).

May 1966: Court of Claims ruled in *Akerson* and *Andrews* that the 1958 Act intended to deny recomputation on the basis of its increased active duty scales, and that public officers must accept the current statutory salary for the office held. 175 Ct. Cl. 551, 561 (1966).

1967: Volumes I and II of the [Hubbell] Report of the First Quadrennial Review of Military Compensation, required by the 1965 enactment of 37 U.S.C. §1008b, were issued. The Department of Defense recognized that its retirement system is *contributory in fact,* and recommended that it become contributory in form, since those who do not qualify for retirement, unlike civil servants, never receive back their

contributions under the present system. Report, Volume I, pp. 44-48, 56 (1967).

1968: The Report of the U. S. Veterans Advisory Commission recommended restoration of recomputation system since the effect of the 1963 Act had resulted in clear discrimination against older members who "retired" earlier under lower effective pay scales. Report, p. 72 (1968).

1969: Volumes IV and V of the [Hubbell] Report of the First Quadrennial Review of Military Compensation, addressed exclusively to the military estate system, were issued. The Department of Defense recognized that a large portion of the pay received on release from active duty is normally required to offset the *income loss* suffered as the result of the need for a second career in midlife, and that such a loss is not properly charged to military personnel, but is a public cost of the need for a youthful defense force. The study documented that while most military "retirees" receive pay for a much longer period than do civil servants, most nevertheless do not receive a comparable net lifetime benefit. Report, Volume IV, pp. S-15, 2-10; Volume V, pp. II-1, 2, 9 and 10, VII-16, VIII-6 (1969).

July
1970: The Secretary of Defense, by way of an open letter, stated that the present Administration

could not afford to remedy the injustice recognized by the President in 1968. See Petition, exhibit 6-1.

Report by the Blue Ribbon Defense Panel to The President and the Secretary of Defense on the Department of Defense noted the problem of *the necessity* of retired military personnel *to obtain civilian employment* and criticized the effect of current restrictions on their dealings with the Department of Defense. Report, pp. 180-88 (1970).

March 1971: The President appointed Interagency Committee to study the military "retirement" and survivor benefit systems.

July 1971: Volume I of the Report to the President on the Study of Uniformed Services Retirement and Survivor Benefits by the Interagency [Kelley] Committee was prepared. It recognized *the unfulfilled obligation of the Government* to those who had served under and in reliance on the recomputation system, but concluded that a return to that system was neither sound nor required in view of the Court of Claims's ruling in *Andrews*. Report, p. 7-5 (1971). It recommended, instead, a system of partial and gradual recomputation on the basis of the 1971 active duty pay scales, ac-

cording to priorities reflecting age, longevity and disability. *Id.* at 7-7.

Oct. 1971: *Abbott* petition filed, seeking either (1) the fulfillment of the Government's obligation to those who made a career choice in reliance on the recomputation system or (2) the return (by way of just compensation) of the deferred contributions made towards the rights now repudiated.

Dec. 1971: The United States moved to dismiss *Abbott* petition.

Report of the [Second] 1971 Quadrennial Review of Military Compensation, pursuant to 37 U.S.C. §1008b, recognized that "Regular Military Compensation is *depressed by 7%* to reflect an imputed contribution towards the member's retirement." Report, p. 3 (1971).

Sept. 1972: The General Counsel of the Department of Defense and the Deputy Assistant Secretary of Defense for Military Personnel Policy testified before the Subcommittee on General Legislation of the House Armed Services Committee on the *7% imputed contribution* towards military retirement which is calculated for purposes of setting *total active duty pay*. Hearings held September 19, 1972, on H.R. 4606, pp. 11, 14-15, 58, 64.

Dec. 1972: The Special Subcommittee on Retired Pay Provisions of the House Armed Services Committee recommended "that recomputation legislation not be further considered by the committee." As legal support for its recommendation, the Subcommittee relied on the Court of Claims' decision in *Akerson* and *Andrews*. H.A.S.C. No. 92-80, 92d C., 2d S. pp. 17626, 17646-48 (1972).

Jan. 1973: Court of Claims dismissed *Abbott* petition, relying on *Akerson* and *Andrews*, and directed petitioners to Congress for relief. Appendix at 7a-8a, *supra*.

April 1973: Court of Claims denied petition for rehearing in *Abbott*.

Appendix D

(1) Retired members of the regular Navy and Marine Corps are subject to recall only in time of war or national emergency. 10 U.S.C. §6481. Retired members of the regular Army and Air Force are subject to recall by the President at any time. 10 U.S.C. §§3504(a), 8504(a). If petitioners' pay were for current service, such different obligations should be reflected by different pay. Yet retired pay of all is measured in an identical manner. 10 U.S.C. §§3991, 6325, 8991.

(2) Retired reservists receive no retired pay, no matter when retired, until age 60. 10 U.S.C. §1331. See also 10 U.S.C. §273(a) (inactive standby reservists); Department of Defense Directive 1215.6, Section IV,E4, and IV,F,3 (June 12, 1971) (active reserves). Regular members of the armed forces receive retired pay immediately on "retirement," as early as age 37. See 10 U.S.C. §1401. If petitioners' pay were for current service, all who perform the same standby service should, but do not, receive the same compensation for such service.

(3) Regular members are involuntarily "retired" in mid-life, and suffer second career income losses. Such losses are not suffered by reservists (or civil service counterparts). This fact explains (1) the difference in treatment between reservists and regular members of the uniformed services, and (2) the fact that the retired pay of regular members is measured without regard to differences in their standby obliga-

tions. The only characterization of petitioners' retired pay consistent with these differences is that it is deferred compensation for their past service: (1) an income supplement until retired from a second career and (2) thereafter earned retired pay for past service supported by petitioners' contributions.

Appendix B

Charles L. Andrews, Jr., et al. v. The United States
[No. 163-64. Decided May 13, 1966]

On Defendant's Motion to Dismiss Petition and Plaintiff's Motion for Summary Judgment

Robert F. Klepinger, attorney of record, for plaintiff.

Arthur E. Fay, with whom was *Assistant Attorney General John W. Douglas,* for defendant. *Edgar H. Twine,* of counsel.

Before COWEN, *Chief Judge,* LARAMORE, DURFEE, DAVIS and COLLINS, *Judges.*

LARAMORE, *Judge,* delivered the opinion of the court:

The facts in this case are identical to those presented in *Akerson, et al. v. United States, ante,* p. 551, this day decided. Plaintiffs are officers of the uniformed services who retired prior to June 1, 1958. For the period from June 1, 1958 to October 1, 1963, they received retired pay based on the active duty pay scales in effect on May 31, 1958, plus a six percent cost-of-living increase. They claim for this period additional retired pay to be based on the active duty "basic pay" provided in the Act of May 20, 1958, 72 Stat. 122. Plaintiffs' claim is not predicated on statutory interpretation as is the *Akerson* petition. Plaintiffs appear to concede that they received all to which they were entitled under the Act. They base their claim on a challenge to the constitutionality of

those provisions of the 1958 Act and the Uniformed Services Pay Act of 1963, 77 Stat. 210, which prevent them from computing their retirement pay on the basis of the 1958 Act's basic pay scales. Defendant has filed a motion to dismiss the petition and plaintiffs have filed a cross-motion for summary judgment.

The essence of plaintiffs' argument is that the United States offered to each officer who performed satisfactory and honorable service for the required number of years "retired pay at the rate of 75% of active duty pay of his rank thereafter provided by Congress." Since each plaintiff accepted that "offer" and gave the United States the bargained-for performance, each plaintiff is entitled to the promised consideration. Under the plaintiffs' theory, both the 1958 and the 1963 Acts breach the contract and, therefore, are unconstitutional under the Fifth Amendment.

The difficulty with this position, as defendant points out, is that there is strong authority for the counter-proposition that officers have no vested or contractual right to any particular amount of retired pay. The general rule has long been that "[a] soldier's entitlement to pay is dependent upon statutory right * * * [and not upon] common-law rules governing private contracts * * *." *Bell v. United States,* 366 U.S. 393, 401 (1961). *Cf., Leonard v. United States,* 279 U.S. 40 (1929); *United States v. McDonald,* 128 U.S. 471 (1888); *Byrd v. United States,* 103 Ct. Cl. 285 (1945); *Amchanitzky v. United States,* 81 Ct. Cl. 409, *cert. denied,* 296 U.S. 598 (1935); *Fulmer v.*

United States, 32 Ct. Cl. 112 (1897); *Magaw v. United States*, 16 Ct. Cl. 3 (1880); *Lowry v. McCarl*, 79 F. 2d 144 (D.C. Cir. 1935); *Heidt v. United States*, 56 F. 2d 559 (5th Cir. 1932). And since the pay of officers in the uniformed services is within the exclusive control of Congress, it was free to limit the benefits of the 1958 active duty pay increase to members on the active duty list.

This is not a harsh result. Plaintiffs do not claim that they were singled out for special unfavorable treatment. They admit that they received a substantial pay increase of six percent. In the conclusion to their brief, they concede that "Congress acted entirely within its constitutional power" in passing the 1963 legislation which ended "[t]he century old traditional concept of retirement pay," but they argue that the new system is constitutional only as it affects newly commissioned officers who are now on notice. We fail to see how plaintiffs were hurt by either the 1958 or the 1963 legislation. They would have to concede that they would have no claim whatsoever under any of their theories had Congress not raised the active duty basic pay in 1958. So they have had to hitch their wagon to the star of those on active duty. No doubt retirees from all industries and professions wish they could benefit from the high pay scales of the recent boom years, but it is difficult to see how there could be any "right" absent an express contract. Congress evidently felt that it had to raise the basic pay to attract and retain competent officers and enlisted men. Of course, the reasons for raising

retired pay were different, and it seems that the cost-of-living increase was a perfectly fair solution.

In summary, the petition fails to state a claim upon which relief can be granted. Defendant's motion to dismiss is granted. Plaintiffs' motion for summary judgment is denied. The petition is dismissed.

Appendix F

National Association for Uniformed Services
956 North Monroe Street
Arlington Virginia 22201
(703) 525-3710

5 June 1973

Dodge—Reyes & Brorby—Kahn & Driscoll
1501 N. Broadway
Walnut Creek, CA 94596

Gentlemen:

Per our last telephone conversation, here is the information you requested.

Number of all retirees as of June 30 for years shown:

1958	213,557
1959	228,389
1960	253,695
1961	289,794
1962	325,481
1963	378,509

OSD does not have exact figures, but their *estimate* for 1 June 1958 is 212,404 and for 1 October 1963 is 391,517.

I should mention that these figures represent everyone drawing a retirement check from DOD. It does

not include those who waive retirement pay to draw VA compensation. Their checks come from the VA.

Sincerely,

/s/ Robert B. Laurents
Robert B. Laurents
Col USAF Ret
Legislative Counsel

RBL:c

Appendix G

The Library of Congress
Congressional Research Service
Washington, D.C. 20540

March 23, 1973

To: Honorable Alan M. Cranston
Attention: Marcia Garrett

From: American Law Division

Subject: Bill Numbers from the 93rd to the 85th Congress Regarding Recomputation of Military Retirement Benefits

This will refer to your inquiry of March 19, 1973 requesting the bill numbers from the 93rd to the 85th Congress regarding the recomputation of military retirement benefits. Under each Congress listed below, please find the listing of such bills together with the index heading assigned by either the *Digest of General Public Bills and Resolutions* or the *Congressional Record*.

93rd Congress

Armed Forces, Pensions—Recomputation

S. 762	H.R. 749	H.R. 1806
S. 838	H.R. 1265	H.R. 2177
H.R. 293	H.R. 1422	H.R. 2189
H.R. 464	H.R. 1565	H.R. 2471
H.R. 504	H.R. 1765	H.R. 2480

93rd Congress (continued)

Armed Forces, Pensions—Equalization

H.R. 213
H.R. 612
H.R. 1608
H.R. 1814
H.R. 2447
H.R. 2606
H.R. 3304
H.R. 3737
H.R. 4460

Armed Forces, Retirement—Computation method and grade, revise

H.R. 103
H.R. 2305
H.R. 2737
H.R. 2965
H.R. 4610

92nd Congress

Retired Military Personnel

Retired pay computation: S. 377, 943, 1350; H.R. 140, 179, 236, 324, 349, 494, 509, 522, 543, 608, 711, 713, 724, 774-776, 872, 1198, 1221, 1290, 1308, 1324, 1333, 1363, 1666, 2197, 2307, 2308, 2344, 2448, 2452, 2468, 2525, 3155, 3342, 3580, 3845, 3851, 3960, 4003, 4161, 4186, 4330, 4351, 4448, 4560, 4706, 4725, 5207, 5264, 5278, 5353, 5373, 5507, 5826, 5850, 5872, 6200, 6378, 6402, 6509, 6644, 6871, 7261, 7400, 7739, 8292, 9276, 10087, 10271.

Retirement

Recomputation: H. R. 12529, 14524, 14643, 14662, 14687, 14871, 14916, 15858, 16216, 16890.

Armed Forces—Retirement

Recomputation: H. R. 14524, 14643, 14662, 14687, 14871, 14916, 15858.

91st Congress

Armed Services—Retirement Computation

Computation: S. 1256, 2317.
H. R. 387, 3327, 4186, 4316, 4585, 5176, 5526, 5547, 5576, 5815, 6174, 6238, 6714, 6756, 7076, 7569, 8030, 8862, 9861, 10933, 11637, 13356, 13839, 13943, 14621.
H. R. 17492, 18304, 19498

Armed Services—Retirement

Pay equalize: S. 364.
H. R. 138, 167, 220, 310, 425, 579, 667, 825, 1242, 1378, 2086, 2389, 2679, 2721, 3787, 4797, 5564, 6217, 7190, 7700, 8026, 8407, 8414, 9408, 9458, 9716, 10630, 10736, 10839, 11019, 11514, 12599, 13096, 13235, 13356, 13449, 13484, 13943, 14004, 14078, 14349, 14358, 14468.

Pay equalize: H. R. 15797, 17493, 17600, 17807, 17859, 17951, 19201, 19431, 19796, 19869.

90th Congress

Armed Services—Retirement Computation
S. 937, H.R. 5943

Armed Services—Retirement

Pay equalize: S. 1877, 2170.
H. R. 243, 594, 796, 909, 2376, 3116, 3302, 3338, 3573, 5280, 5725, 5917, 6302, 7482, 8274, 8761, 11239, 11240, 11432, 11437, 11468, 11754, 12385, 12558, 12656, 12821, 12835, 12873, 13680, 13721, 13880, 14406.

90th Congress (continued)

Pay equalize: S. 3618.
H. R. 15102, 15507, 15542, 15620, 15669, 15732, 16021, 16060, 16122, 16212, 16774, 17000, 17592, 17652, 17673, 17710, 17717, 17719, 18117, 18246, 18463, 18539, 18755, 19021, 19782, 20130, 20424, 20425.

89th Congress

Retirement, Military, Computation of pay
S. 540, H.R. 5256

Computation of pay:
H. R. 12183, 13149, 13868, 14057, 14484, 14966, 15474, 15634, 15700, 15961, 16015, 16161, 16174, 16287, 16333, 16424, 16554, 16592, 17244, 15739.

Retirement, Military, Computation of service
S. 173, H.R. 1990

Retirement, Military, Pay equalization
H.R. 2022

Pay, equalization: H. R. 13149, 13868, 14966, 15474, 15634, 15700, 15961, 16015, 16161, 16174, 16287, 16333.

88th Congress

Retirement, Military, Computation of pay
S. 2091, H.R. 6000, 7540

Retirement, Military, Pay equalization

Pay, equalization S. 401, 658, 2081.
H. R. 361, 995, 1022, 1621, 2850, 3010, 3315, 4249, 5915, 5967, 6067.

87th Congress

Retirement, Military Pay equalization
Pay, equalization S. 401, 626.
H. R. 131, 174, 199, 1167, 1169, 1188, 1236, 1758, 2290, 2695, 2929, 2957, 3153, 3304, 3666, 3871, 3955, 4331, 4779, 4891, 6177, 6533, 7282.
H. R. 9514

Retirement, Military Pay for Service Prior to June 1, 1958
H.R. 4330

86th Congress

Retirement, Military pay equalization
Pay, equalization (S. 269, 541; H. R. 703, 807, 957, 1866, 1969, 1982, 1997, 2255, 2464, 2469, 2757, 2768, 2801, 2879, 2912, 2940, 2973, 3015, 3019, 3037, 3164, 3210, 3284, 3328, 3373, 3691, 4007, 4215, 4321, 4378, 4461, 4534, 4592, 4629, 4721, 4804, 4813, 4885, 4917, 5113, 5129, 5405, 5791, 6357, 7322, 7442, 8265).
H.R. 9304, 10274, 11318

Retirement, Military Pay Prior to June 1, 1958
H.R. 11812

85th Congress

no relevant bills found

/s/ Thomas N. Lyons
Thomas N. Lyons
American Law Division

Appendix H

U.S. House of Representatives
Committee on Armed Services
Washington, D.C. 20515
Ninety-third Congress
F. Edward Hebert, Chairman

Armed Services Committee Announcement Concerning Recomputation of Military Retired Pay

Many people have written the Committee on Armed Services expressing views on recomputation of military retired pay. Because of the volume of mail, it is necessary to take this means of acknowledging correspondence.

In the closing days of the 92d Congress the Special Subcommittee on Retired-Pay Revisions held extensive hearings on the matter of recomputation. A copy of the subcommittee's report is enclosed.

Individuals should read the subcommittee's report in its entirety before forming a judgment as to the government's obligation in this matter. The report was approved unanimously by the members of the subcommittee.

In view of the subcommittee's thorough study and recommendations, I have no plans to schedule further action on recomputation legislation.

/s/ F. Edw. Hebert
F. Edw. Hebert
Chairman

Enclosure
June 18, 1973